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No. 16-348

Supreme Court of the United States

MIDLAND FUNDING, LLC,

Petitioner,

v.

ALEIDA JOHNSON,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND REVERSAL

Interest of the *Amicus Curiae*[1]

ACA International, the Association of Credit & Collection Professionals, is a Minnesota nonprofit corporation with offices in Washington, D.C., and Minneapolis, Minnesota.

Founded in 1939, ACA represents nearly 3,700 members, including credit grantors, collection agencies, attorneys, asset buyers, and vendor affiliates. ACA produces a wide variety of products, services, and publications, including educational and compliance-related information; and articulates the value of the credit-and-collection industry to businesses, policymakers, and consumers.

ACA company members range from small businesses with a few employees to large, publicly

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[1] No counsel for any Party authored this brief in whole or in part. Neither any such counsel nor any Party made a monetary contribution intended to fund this brief's preparation or submission. No person (other than Amicus Curiae ACA International, its members, and its counsel) made such a monetary contribution.

All the Parties have granted their written consent under Rule 37.3(a) for ACA International to file an *amicus curiae* brief.

held corporations. They include small businesses that operate within a single community or state, and large corporations doing business in every state. But most ACA company members are small businesses, collecting rightfully owed debts on behalf of other small and local businesses. Of ACA's member organizations, 86 percent have fewer than 50 employees, and 48 percent have fewer than nine employees.[2]

Summary of Argument

The credit-and-collection industry fulfills an important economic function, and must be able to perform that function with respect to debt that may be time-barred. Debt collectors and debt buyers are an extension of every community's businesses, whose combined effort has resulted in the annual recovery of billions of dollars that would otherwise constitute losses on those businesses' financial statements. Without an effective collection process, the economic viability of these businesses — and, by extension, the American economy in general — is threatened. The economic and social benefit that

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[2] Josh Adams, *ACA International White Paper, Small Businesses in the Collection Industry: An Overview of Organization Size and Employment* 2 (Aug. 2016), http://www.acainternational.org/files.aspx?p=/images/40363/aca-wp-smallbusiness.pdf.

the credit-and-collection industry provides apply with no less force to time-barred debt, or debt that *may* be time-barred, than to any other debt. There may also be reasons why the *debtor* wants to resolve an otherwise time-barred debt. If a debt collector cannot work with the debtor on resolving debt that may be time-barred, then both the creditor and the debtor may end up worse off.

For years, the credit-and-collection industry has relied on a long and consistent series of judicial opinions under which the Bankruptcy Code and the Fair Debt Collection Practices Act have operated alongside each other: a debt collector or a debt buyer could participate in the bankruptcy process without running afoul of the Fair Debt Collection Practices Act, and could submit a proof of claim as to a debt — even a time-barred debt — in the bankruptcy process so that the bankruptcy estate could be administered in an orderly and complete manner and so that the debt could be discharged or otherwise disposed of under the bankruptcy law. The Eleventh Circuit's holding in *Crawford v. LVNV Funding, LLC*,[3] called that longstanding and consistent interpretation into question, and has caused confusion in the credit-and-collection industry. Under the Eleventh Circuit's holding, a debt collector or a debt buyer may run afoul of the Fair Debt Collection Practices Act by doing nothing

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[3] *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014).

more than presenting a time-barred debt to a bankruptcy court for administration as part of a bankruptcy estate. As a result, at least in the Eleventh Circuit, debt collectors and buyers are less likely to present such debts in the bankruptcy process — with the result that the bankrupt debtor may not obtain the complete relief to which the debtor is otherwise entitled. That result is unfair to the debt collectors and buyers — not only because it is substantively unfair, but because the law should not force those collectors and buyers (and their attorneys) into the Hobson's choice of either filing a proof of claim and facing liability under the Fair Debt Collection Practices Act, or being excluded from the bankruptcy process in order to avoid such liability. But that result can also be unhealthy for the debtor, in that it could prevent the resolution of unpaid debt that the debtor may want discharged for any number of reasons.

Whether a debt is stale usually depends on simple facts, which the Rule 3001 disclosure elicits — but determining whether the debt is stale then requires the application of law to those facts. That determination is also simple in many cases — but not always. Even in the simplest cases, determining whether a debt is subject to a limitations defense involves several basic questions:

- What law applies?
- Under the governing law, what is the applicable statute of limitations?

- Has the statute of limitations been tolled? Has it been reset?

State law governs a debt's enforceability, and statutes of limitations differ from state to state. And even within a state, correctly categorizing a debt may expose a debt collector to error. While a non-lawyer debt collector may be able to reach an informed view about whether a debt is subject to a limitations defense, that view may be mistaken in the absence of a more sophisticated legal analysis. To impose that burden, and the concomitant risk of liability, on debt collectors acting in good faith goes far beyond any duty that Congress imposed on debt collectors under the Fair Debt Collection Practices Act. Rule 3001 established a new regime that substitutes disclosure for liability.

Federal Rule of Bankruptcy Procedure 3001 requires the disclosure, in "a statement . . . filed with the proof of claim," of the relevant facts from which a debt's timeliness can be ascertained. Thus, the Bankruptcy Rules already require that a claimant provide information to determine whether a debt is stale. Compliance with that requirement — that is, truthfully furnishing all the information from which the debtor, the trustee, the bankruptcy court, and other creditors may "assess[] the timeliness of the claim" — should be enough to avoid liability for any alleged violation of the Fair Debt Collection Practices Act.

If a debt collector cannot file a proof of claim as to a stale debt without violating the Fair Debt

Collection Practices Act, then fewer proofs of claim will be filed as to such debts. Keeping a debt out of bankruptcy is especially problematic where the potentially time-barred debt is not, in fact, time-barred — that is, where the debt collector decides that the risk of taking a mistaken view of the law outweighs the risk of forgoing collection of a legitimate and fully collectible debt. That result is unfair to the debt collectors and to creditors. But that result can also be unhealthy for the debtor, in that it could prevent the discharge of the unpaid debt that the debtor may have forgotten to include in his or her bankruptcy petition. If the stale debt is not discharged, then it may still be subject to collection, because it was not included in the bankruptcy discharge. And if the debt is not actually stale, then it may still result in litigation against the debtor. In either case, the debtor will not have gotten the "fresh start" that the Bankruptcy Code promises. An old debt that is not discharged in the bankruptcy — especially if the debt is not actually outside the statute of limitations —could prevent the resolution of unpaid debt that the consumer may want to settle for any number of reasons. The omission of an old debt from the bankruptcy will also deprive the debtor of the benefits of a bankruptcy discharge, such as protection against discriminatory treatment based on the omitted debt.

Argument

I. The credit-and-collection industry fulfills an important economic function, and must be able to perform that function with respect to debt that may be time-barred.

As part of the process of attempting to recover outstanding payments, ACA members and debt collectors more generally are an extension of every community's businesses. Debt collectors work with these businesses, large and small, to obtain payment for the goods and services already received by consumers. In years past, the combined effort of ACA members and other debt collectors has resulted in the annual recovery of billions of dollars — dollars that are returned to and reinvested by businesses, and that would otherwise constitute losses on those businesses' financial statements. Without an effective collection process, the economic viability of these businesses — and, by extension, the American economy in general — is threatened. Recovering rightfully owed consumer debt lets organizations survive; helps prevent job losses; keeps credit, goods, and services available; and reduces the need for tax increases to cover governmental budget shortfalls.[1]

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[1] *See, e.g.*, Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry* i (Jan. 2013) ("Debt buying can reduce the losses that creditors incur in providing credit, thereby allowing creditors to provide more credit at

In 2013, Ernst &Young conducted a study to measure the various impacts of third-party debt collection on the national and state economies. In addition to recovering rightfully-owed consumer debt totaling $44.9 billion in 2013 alone, the study found that third-party debt collectors directly provided over 136,000 jobs and $6.4 billion in payroll. When factoring in jobs created indirectly, those numbers doubled to 231,000 jobs and $12.4 billion in payroll. Third-party debt collectors paid $687 million in state and local taxes and $724 million in federal taxes. The total state and local tax impact of third-party debt collectors was $1.3 billion, and the total federal impact was $1.4 billion.[5]

The economic and social benefit that the credit-and-collection industry provides apply with no less force to time-barred debt, or debt that *may* be time-barred, than to any other debt. A dollar collected on a stale debt works just as hard to keep prices and taxes down, to keep workers employed, and to keep a business open as does a dollar collected on a more recent obligation. A statute of

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lower prices."), https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf.

[5] Ernst &Young, *The Impact of Third-Party Debt Collection on the National and State Economies in 2013* (July 2014), http://www.acainternational.org/economicimpact.aspx.

limitation is a choice that society makes to limit the remedies available to a creditor or collector seeking to collect old debt, and any such limitation serves a useful purpose "by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[6] But each such limitation comes at a price — because it deprives some business, or some government, or some individual, or some other creditor of income to which it was lawfully entitled before the bar of the limitation period fell. That tradeoff should not be any more burdensome to the creditor or collector than losing the right to a judicial remedy already makes it.

There may also be reasons why the *debtor* wants to resolve an otherwise time-barred debt. Outside the bankruptcy context, courts often recognize the sense of "moral obligation" that may lead a debtor to resolve a debt subject to a limitations defense.[7] There may be other reasons besides "moral obligation" as well:

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[6] *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944).

[7] *See, e.g., McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014) ("We do not hold that it is automatically improper for a debt collector to seek repayment of time-barred debts; some people might consider full debt repayment a moral obligation, even though the legal remedy for the debt has been extinguished.").

- A debt subject to a limitations defense may remain on a debtor's credit report for up to seven years,[8] which is longer than the statute of limitations in many states, thereby affecting the debtor's credit even though a judicial remedy is no longer available.
- A lender may require repayment of a debt subject to a limitations defense as a condition for extending new credit.[9]
- A lender may ask that the debtor disclose any unresolved default in an application for new credit.
- A professional licensing agency may ask the debtor about any unresolved default.
- The debtor may want to relieve a joint obligor from the collateral consequences of the debtor's default.[10]

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[8] *See* 15 U.S.C. § 1681c(a)(4).

[9] *See In re Brady*, 171 B.R. 635, 639–40 (Bankr. N.D. Ind. 1994) ("The court agrees with those decisions holding that a creditor has the right to condition its acquiescence to a reaffirmation agreement upon the reaffirmation of other indebtedness. The court believes that reaffirmation is an 'invitation to negotiation' and that either party may decline to reaffirm for any reason." (quoting *Gen. Motors Acceptance Corp. v. Bell (In re Bell)*, 700 F.2d 1053, 1056 (6th Cir. 1983)).

- The debtor may want to keep a guaranty from being invoked, especially if the statute of limitations has not run on the guaranty even though it may have run on the underlying debt.[11]

If a debt collector cannot work with the debtor on resolving debt that may be time-barred, then both the creditor and the debtor may end up worse off.

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[10] *See Paglia v. Ski Bank (In re Paglia)*, 302 B.R. 162, 167–68 (Bankr. W.D. Pa. 2003) ("acting out of filial loyalty, [debtor] himself took the initiative and volunteered to execute the second note so defendant would not take legal action against his mother's annuity").

[11] *Broadrick v. LVNV Funding LLC (In re Broadrick)*, 532 B.R. 60, 74 (Bankr. M.D. Tenn. 2015) ("For example, if the debtor's parents are also obligated on a debt, the debtor might want to see a creditor paid, particularly if the statute of limitations has not run on the parents' guaranty even though there was arguably a statute of limitations defense for the debtor.").

II. The credit-and-collection industry has relied on a long and consistent series of judicial opinions under which a debt collector or a debt buyer can participate in the bankruptcy process without running afoul of the Fair Debt Collection Practices Act, but the Eleventh Circuit's anomalous approach has caused confusion throughout the industry.

For years, the credit-and-collection industry has relied on a long and consistent series of judicial opinions under which the Bankruptcy Code and the Fair Debt Collection Practices Act have operated alongside each other: a debt collector or a debt buyer could participate in the bankruptcy process without running afoul of the Fair Debt Collection Practices Act,[12] and could submit a proof of claim as

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[12] *See, e.g.*, *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 95 (2d Cir. 2010) ("Federal courts have consistently ruled that filing a proof of claim in bankruptcy court (even one that is somehow invalid) cannot constitute the sort of abusive debt collection practice proscribed by the FDCPA, and that such a filing therefore cannot serve as the basis for an FDCPA action."); *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 510 (9th Cir. 2002) ("While the FDCPA's purpose is to avoid bankruptcy, if bankruptcy nevertheless occurs, the debtor's protection and remedy remain under the Bankruptcy Code."); *Buckley v. Bass & Assocs.*, 249 F.3d 678, 681 (7th Cir. 2001) ("such claims are outside the scope of the Fair Debt Collection Practices Act"); *Baldwin v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C.*, No. 98 C 4280, 1999 U.S. Dist. LEXIS 6933, at *15–18 (N.D. Ill. Apr. 19, 1999).

to a debt — even a time-barred debt — in the bankruptcy process so that the bankruptcy estate could be administered in an orderly and complete manner and so that the debt could be discharged or otherwise disposed of under the bankruptcy law. From the Bankruptcy Code's enactment in its current form in 1978,[13] it took two decades before anyone thought to file a lawsuit alleging that a proof of claim in bankruptcy had violated the Fair Debt Collection Practices Act.[14]

But the United States Court of Appeals for the Eleventh Circuit has tried to upend that consistent and reliable precedent,[15] with results that have confused the credit-and-collection industry, that have created an unnecessary conflict between two federal statutes and among the circuit courts of appeals, that will frustrate the Bankruptcy Code's purpose of giving debtors a fresh start, and that will unfairly impose liability on debt collectors for following a longstanding and consistent rule that multiple federal appellate courts have articulated.

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[13] *See* Pub. L. No. 95-598, 92 Stat. 2549 (1978).

[14] *See Adair v. Sherman*, No. 98 C 3946, 1999 U.S. Dist. LEXIS 2534 (N.D. Ill. Mar. 1, 1999).

[15] *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1262 (11th Cir. 2014) ("Just as LVNV would have violated the FDCPA by filing a lawsuit on stale claims in state court, LVNV violated the FDCPA by filing a stale claim in bankruptcy court.").

The Eleventh Circuit's holding in *Crawford v. LVNV Funding, LLC*,[16] called that longstanding and consistent interpretation into question, and has caused confusion in the credit-and-collection industry. Under the Eleventh Circuit's holding, a debt collector or a debt buyer may run afoul of the Fair Debt Collection Practices Act by doing nothing more than presenting a time-barred debt to a bankruptcy court for administration as part of a bankruptcy estate. As a result, at least in the Eleventh Circuit, debt collectors and buyers are less likely to present such debts in the bankruptcy process — with the result that the bankrupt debtor may not obtain the complete relief to which the debtor is otherwise entitled.

That result is unfair to the debt collectors and buyers — not only because it is substantively unfair, but because the law should not force those collectors and buyers (and their attorneys) into the Hobson's choice of either filing a proof of claim and facing liability under the Fair Debt Collection Practices Act, or being excluded from the bankruptcy process in order to avoid such liability. But that result can also be unhealthy for the debtor, in that it could prevent the resolution of unpaid debt that the debtor may want discharged for any number of reasons.

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[16] *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014).

Every other federal circuit court of appeals that has considered this issue since *Crawford* has rejected the Eleventh Circuit's approach.[17] This Court should correct the Eleventh Circuit's frustrating and confusing error.

III. The Eleventh Circuit's approach imposes an unwarranted burden and risk on debt collectors acting in good faith.

A. Whether a debt is subject to a limitations defense is not necessarily a simple question that can always be easily answered.

Whether a debt is stale usually depends on simple facts, which the Rule 3001 disclosure elicits — but determining whether the debt is stale then requires the application of law to those facts. That determination is also simple in many cases — but not always.

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[17] *See Dubois v. Atlas Acquisitions LLC (In re Dubois)*, No. 15-1945, 2016 U.S. App. LEXIS 15682, at *16–23 (4th Cir. Aug. 25, 2016) ("We conclude that filing a proof of claim in a Chapter 13 bankruptcy based on a debt that is time-barred does not violate the FDCPA when the statute of limitations does not extinguish the debt."); *Owens v. LVNV Funding, LLC*, 832 F.3d 726, 735 (7th Cir. 2016) ("Like the Eighth Circuit, we decline to follow the Eleventh Circuit's approach."); *Nelson v. Midland Credit Mgmt., Inc.*, 828 F.3d 749, 752 (8th Cir. 2016) ("This court rejects extending the FDCPA to time-barred proofs of claim.").

Even in the simplest cases, determining whether a debt is subject to a limitations defense involves several basic questions:

- **What law applies?** Does the applicable agreement provide a choice of law? Or does the law of the place where the debtor entered into the agreement govern? Or the law of the forum where a lawsuit would be brought?
- **Under the governing law, what is the applicable statute of limitations?** There is more than one available answer in some jurisdictions. For example, Illinois has different limitations periods for "written" and "unwritten" agreements (and "written" and "unwritten" don't necessarily mean what they sound like — an "unwritten" agreement can mean a written agreement that isn't exhibited to the complaint in an action for collection).[18]
- **Has the statute of limitations been tolled? Has it been reset?**

One could teach an entire law-school course on the statute of limitations. Even in a simple case, there

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[18] *Ramirez v. Palisades Collection LLC*, No. 07 C 3840, 2008 U.S. Dist. LEXIS 48722, at *6–8 (N.D. Ill. June 23, 2008).

are often questions over which reasonable minds can differ in good faith, hence the not-infrequent litigation over the statute of limitations.

State law governs a debt's enforceability, and statutes of limitations differ from state to state. For example, just within the three states in the Eleventh Circuit:

- The statute of limitations on a written contract is six years in Alabama[19] (ten years if the writing is under seal[20]) and Georgia[21] (but twenty years if the instrument is under seal[22]), but only four years in Florida.[23]
- The statute of limitations on an oral contract is six years in Alabama,[24] but four years in Florida[25] and Georgia.[26]
- The statute of limitations on a judgment is twenty years in

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[19] Ala. Code § 6-2-34(4).

[20] *Id.* § 6-2-33(1).

[21] Ga. Code § 9-3-24.

[22] *Id.* § 9-3-23.

[23] Fla. Stat. § 95.11(2)(b).

[24] Ala. Code § 6-2-34(9).

[25] Fla. Stat. § 95.11(3)(k).

[26] Ga. Code § 9-3-25.

Alabama[27] and Florida,[28] but seven years in Georgia.[29]

- The statute of limitations on an open account is three years in Alabama,[30] but neither Florida nor Georgia has a statute that applies to open accounts.

And even within a state, correctly categorizing a debt may expose a debt collector to error. For example, in one recent case involving collection of a credit-card debt, *Taylor v. First Resolution Investment Corp.*,[31] an Ohio state court "held that [Ohio's] borrowing statute did not apply, that Ohio law governed the determination of the statute of limitations, that Ohio law imposed either a 6- or 15-year statute of limitations," and that the collection lawsuit was timely under either limitation period.[32] But the appellate court reversed the trial court, holding that Delaware's three-year statute of limitations applied because

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[27] Ala. Code § 6-2-32.

[28] Fla. Stat. § 95.11(1).

[29] Ga. Code § 9-12-60(a)(1).

[30] Ala. Code § 6-2-37(1).

[31] *Taylor v. First Resolution Inv. Corp.*, 2016-Ohio-3444, 2016 Ohio LEXIS 1654 (Ohio June 16, 2016).

[32] *Id.*, 2016-Ohio-3444, ¶ 29, 2016 Ohio LEXIS 1654, at *18.

the issuing bank was located in Delaware.[33] The Ohio supreme court agreed with the intermediate appellate court, and held that the debt was time-barred — in a 184-paragraph analysis that included a majority opinion in which one justice concurred only in the judgment, a partial concurrence in which two justices joined,[34] and a dissent by the chief justice in which one other justice joined.[35]

The *Taylor* trial judge spotted the right issues but, according to the appellate courts, reached the wrong holding. The seven-justice supreme court couldn't say what the right holding was without writing three opinions, including a dissent. If those judges couldn't agree on what the correct result, how is a non-lawyer debt collector supposed to figure it out?

Some debt-collection firms are law firms, but many are not. And some debt collectors are licensed lawyers, but many are not. While a non-lawyer debt collector may be able to reach an informed view about whether a debt is subject to a limitations defense, that view may be mistaken in the absence of a more sophisticated legal analysis. To impose

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[33] *Id.*, 2016-Ohio-3444, ¶ 16, 2016 Ohio LEXIS 1654, at *12.

[34] *Id.*, 2016-Ohio-3444, ¶ 108, 2016 Ohio LEXIS 1654, at *63.

[35] *Id.*, 2016-Ohio-3444, ¶ 123, 2016 Ohio LEXIS 1654, at *71.

that burden, and the concomitant risk of liability, on debt collectors acting in good faith goes far beyond any duty that Congress imposed on debt collectors under the Fair Debt Collection Practices Act — and as this Court has reminded all debt collectors, a mistaken view of the law is not an excuse and may result in significant civil liability.[36] Rule 3001 established a new regime that substitutes disclosure for liability.

B. The Bankruptcy Rules require that a claimant provide information to determine whether a debt is stale, and compliance with that requirement should be enough (and should not result in potential liability).

Whether a debt is stale usually depends on simple facts. Federal Rule of Bankruptcy Procedure 3001 requires the disclosure, in "a statement . . .

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[36] *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 582–84 (2010) ("Our law is therefore no stranger to the possibility that an act may be 'intentional' for purposes of civil liability, even if the actor lacked actual knowledge that her conduct violated the law. . . . Congress . . . did not confine liability under the FDCPA to 'willful' violations, a term more often understood in the civil context to excuse mistakes of law."). The *Jerman* Court left open the question of whether a mistake of state law, or of federal law other than the Fair Debt Collection Practices Act, could expose a debt collector to liability. *Id.* at 580 n4.

filed with the proof of claim," of the relevant facts from which a debt's timeliness can be ascertained:

> When a claim is based on an open-end or revolving consumer credit agreement — except one for which a security interest is claimed in the debtor's real property — a statement shall be filed with the proof of claim, including all of the following information that applies to the account:
>
> (i) the name of the entity from whom the creditor purchased the account;
>
> (ii) the name of the entity to whom the debt was owed at the time of an account holder's last transaction on the account;
>
> (iii) the date of an account holder's last transaction;
>
> (iv) the date of the last payment on the account; and
>
> (v) the date on which the account was charged to profit and loss.[37]

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[37] Fed. R. Bankr. P. 3001(c)(3)(A).

When this Court adopted that rule in 2011, the advisory committee specifically noted that "[d]isclosure of the information required by paragraph (3) will . . . provide a basis for assessing the timeliness of the claim."[38] Thus, the Bankruptcy Rules already require that a claimant provide information to determine whether a debt is stale. Compliance with that requirement — that is, truthfully furnishing all the information from which the debtor, the trustee, the bankruptcy court, and other creditors may "assess[] the timeliness of the claim" — should be enough to avoid liability for any alleged violation of the Fair Debt Collection Practices Act.[39]

IV. Discouraging the filing of potentially stale claims may deprive debtors of the "fresh start" that the Bankruptcy Code promises by preventing those claims from being discharged.

If a debt collector cannot file a proof of claim as to a stale debt without violating the Fair Debt Collection Practices Act, then fewer proofs of claim

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[38] *Id.* committees notes (2011 amend. II).

[39] *See B-Real, LLC v. Rogers*, 405 B.R. 428, 431 (M.D. La. 2009) ("It is difficult for this Court to understand how a procedure outlined by the Bankruptcy Code could possibly form the basis of a violation under the FDCPA.").

will be filed as to such debts.[10] The rule that the Eleventh Circuit has adopted will have certain foreseeable effects:

- A proof of claim will not be filed as to some debts because they are stale.
- Some debts that are stale will be kept out of bankruptcy.
- A proof of claim will not be filed as to some debts that are potentially but not actually stale, but where the debt collector decides that the risk of defending against a claim under the Fair Debt Collection Practices Act outweighs the benefit of presenting the claim in the bankruptcy.
- Some debts that are potentially but not actually stale will be kept out of bankruptcy.

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[10] *See MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 916 (9th Cir. 1996) ("The threat of later state litigation may well interfere with the filings of claims by creditors and with other necessary actions that they, and others, must or might take within the confines of the bankruptcy process. Whether creditors should be deterred, and when, is a matter unique to the flow of the bankruptcy process itself . . . ."); *Baldwin v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C.*, No. 98 C 4280, 1999 U.S. Dist. LEXIS 6933, at *17 (N.D. Ill. Apr. 19, 1999) ("creditors may be deterred from filing claims").

These effects are especially problematic where the potentially time-barred debt is not, in fact, time-barred — that is, where the debt collector decides that the risk of taking a mistaken view of the law outweighs the risk of forgoing collection of a legitimate and fully collectible debt. That result is unfair to the debt collectors and to creditors.

But that result can also be unhealthy for the debtor, in that it could prevent the discharge of the unpaid debt that the debtor may have forgotten to include in his or her bankruptcy petition. Stale debt is, after all, *old* debt, and thus more likely to be overlooked or forgotten simply by virtue of that fact.[11] If the stale debt is not discharged, then it may still be subject to collection, because it was not included in the bankruptcy discharge. And if the debt is not actually stale, then it may still result in litigation against the debtor. In either case, the debtor will not have gotten the "fresh start" that the Bankruptcy Code promises:

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[11] *See Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1261 (11th Cir. 2014) (the "debtor's memory of a stale debt may have faded and personal records documenting the debt may have vanished"); *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir Ill. 2013) (quoting *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987) ("the passage of time not only dulls the consumer's memory of the circumstances and validity of the debt, but heightens the probability that she will no longer have personal records detailing the status of the debt")).

> . . . application of the FDCPA to bankruptcy proofs of claim would undermine the central purpose of the Bankruptcy Code, namely, to adjudicate and conciliate all competing claims to a debtor's property in one forum and one proceeding. . . . Permitting debtors to premise FDCPA actions on proofs of claim filed in bankruptcy proceedings would give rise to two definite risks. The first is that creditors may be deterred from filing claims, thus defeating the point of bringing all claims together in one proceeding[]. . . . The second risk is that the possibility of an FDCPA claim, with its provisions permitting statutory and actual damages and attorney's fees, could prompt debtors to ignore the procedural safeguards within the Bankruptcy Code, such as the right to object to proofs of claim and to seek sanctions against creditors who violate provisions within the Bankruptcy Code, in favor of the FDCPA. . . . The practice of debtors deliberately bypassing the Bankruptcy Code's objection process in favor of

alternative litigation would undermine the entire bankruptcy system.[42]

An old debt that is not discharged in the bankruptcy — especially if the debt is not actually outside the statute of limitations — can also be unhealthy for the debtor, in that it could prevent the resolution of unpaid debt that the consumer may want to settle for any number of reasons. The omission of an old debt from the bankruptcy will also deprive the debtor of the benefits of a bankruptcy discharge, such as protection against discriminatory treatment based on the omitted debt.[43]

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[42] *Baldwin v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C.*, No. 98 C 4280, 1999 U.S. Dist. LEXIS 6933, at *15–18 (N.D. Ill. Apr. 19, 1999).

[43] *See* 11 U.S.C. § 525 (protection against discriminatory treatment).

Conclusion

This Court should therefore reverse the Court of Appeals' judgment.

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